No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,
v.
TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

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CONSITUTIONAL PROVISIONS INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const., Amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const., Amend. XIV.

CASES CITED

STATUTES AND RULES CITED

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of California Attorneys for Criminal Justice (CACJ). CACJ is the largest statewide organization of criminal defense attorneys in the United States, having approximately 2,700 dues paying members. The membership of CACJ is drawn from both the public and private criminal defense bars. Under the by-laws of CACJ, article IV, the organization exists to protect and ensure by rule of law those rights secured by the Constitutions of the United States and the State of California.

Like Wisconsin, California has its own set of "hate crime" offense enhancer statutes, which raise most of the same constitutional issues as Wisconsin Criminal Code Section 939.645. *See* note 1, *infra*. CACJ has consistently opposed these statutes, both on the ground that the statutes violate elementary principles of First Amendment jurisprudence, and on the ground that the statutes are so susceptible of selective application that they are inherently likely to become instruments directed at prosecuting, rather than protecting, the members of insular racial, ethnic, and religious groups.

The presentation of the views expressed in this brief is particularly important because in this case a national organization which styles itself as the guardian of civil liberties and constitutional freedoms has chosen, due to the avowed depth of its commitment to equal protection of the laws, to submit an *amicus curiae* brief urging reversal.

The ugliness of racially motivated "hate crime" is unquestioned. CACJ supports reasoned efforts, made within constitutional bounds, to reduce this evil. However, the aphorism that "hard cases make bad law" remains truer than ever. In approaching its task of

deciding the present case, the Court should bear in mind the admonition of Justice Robert Jackson in another notable "hate crime" case before the Court some 41 years ago:

> No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow. In these, as in other matters, our guiding spirit should be that each freedom is balanced with a responsibility, and every power of the State must be checked with safeguards.

Beauharnais v. *Illinois*, 343 U.S. 250, 304-05 (1952) (Jackson, J., dissenting).

In the interest of preserving vital constitutional safeguards, CACJ submits to the Court this brief of *amicus curiae*, in support of affirmance.

SUMMARY OF THE ARGUMENT

Wisconsin Criminal Code section 939.645 is an undisguised punishment of a content-based category of "bad thoughts." Even though the state clearly has the power to punish crimes committed as the result of "bad thoughts," the state may not set up a sentence enhancement scheme which discriminates among defendants who have committed the same criminal act, with the same criminal intent, based solely on the content of the defendants' thoughts. Such a distinction is not "necessary" to serve the state's admittedly compelling interest in seeking to prevent "hate crimes." Under *R.A.V.* v. *City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), Section 939.645 violates the First Amendment.

The argument that respondent Mitchell's conduct is "unprotected" by the First Amendment because it involved a violent crime is a misleading play on words. Although the term "unprotected" expression has sometimes been used by the Court, *R.A.V.*

recognized that the Court has never applied this concept to find any category of speech or expression wholly invisible to the First Amendment. While Wisconsin may properly punish Mitchell for his crime, it may not impose additional punishment upon him on the basis of the content of his thought and expression.

This case is unlike the Court's sentencing cases, such as *Dawson* v. *Delaware*, ___ U.S. ___, 112 S.Ct. 1093 (1992), and *Barclay* v. *Florida*, 463 U.S. 938 (1982), which upheld the discretion of a sentencing judge to consider the defendant's pattern of beliefs and motivations, among a myriad of other factors, in selecting a sentence. *Dawson* and *Barclay* were predicated upon the virtually unlimited range of information which sentencing judges may consider in assessing the defendant's overall character. Such consideration in sentencing is altogether different from the application of a substantive criminal penalty which is based upon the content of thought and expression.

The First Amendment problem raised by Section 939.645 also differs markedly from anti-discrimination legislation. Such legislation, typically, is concerned with providing aid to the economic victims of discrimination, rather than with punishment. For this reason, actual proof of discriminatory intent is not required in order to establish a violation of such statutes. Such economic regulations are far more necessary, in relation to their underlying purposes, than are sentence enhancements for "hate crime." Content-neutral criminal statutes are available for punishing "hate crime," and there is no reason to conclude that such statutes are inadequate for achieving this purpose.

In this case, respondent Mitchell is himself a member of a racial minority. Anecdotal evidence indicates that this situation tends to be the rule rather than the exception. Members of disempowered groups are more likely than other persons to use language that can be interpreted, in hindsight, as evidence of group

"hate." Thus, in practice, statutes such as Section 939.645 are frequently used to prosecute, rather than "protect," members of disempowered groups.

The application of a statute such as Section 939.645 is open to virtually limitless prosecutorial discretion. Like other such "hate crime" statutes, Section 939.645 is arbitrary and fatally vague. It is inherently impossible to ascertain whether or not the motivation for a crime is truly the victim's group status as enumerated in the statute, or rather, some non-statutory attribute of the victim. The irrationality of this legislative classification, and the expression-related basis of the classification, render Section 939.645 invalid under the Due Process and Equal Protection clauses of the Constitution as well as the First Amendment.

ARGUMENT

I. A STATE CRIMINAL STATUTE SUCH AS WISCONSIN CRIMINAL CODE SECTION 939.645, WHICH PROVIDES AN INCREASED MAXIMUM SENTENCE FOR A CRIME IN WHICH THE VICTIM IS "INTENTIONALLY SELECTED" BECAUSE OF THE VICTIM'S RACE, RELIGION, COLOR, DISABILITY, SEXUAL ORIENTATION, OR ANCESTRY, VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION, IN THAT SUCH A STATUTE PUNISHES THOUGHT AND EXPRESSION.

In his majority opinion for the Court in *Stanley* v. *Georgia*, 394 U.S. 557, 565-66 (1969), the late Justice Thurgood Marshall wrote:

> Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds . . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desireability of controlling a person's private thoughts.

These eloquent words belie the fundamental position of Petitioner: That a criminal statute such as Wisconsin Criminal Code section 939.645, which was enacted for the manifest purpose of punishing thought, raises no concern under the First Amendment.

Section 939.645 is a content-based punishment of thought and the expression of thought which is not necessary to advance the state's interest in punishing crimes committed due to the perpetrator's perception that the victim belongs to a "hated" racial, religious, or other enumerated group. Like the St. Paul ordinance

considered by the Court last Term in *R.A.V.* v. *City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Section 939.645 violates the First Amendment.

A. The Wisconsin "Enhancer" Criminal Statute and Its Kindred Punish Expression Based on Content.

Petitioner and *amici curiae* argue strenuously that the Wisconsin Supreme Court erred in its conclusion that Wisconsin Criminal Code section 939.645 constitutes a direct punishment of thought. Although the wording of the Wisconsin statute may lend this argument cursory appeal, the statute's application in theory and in practice readily reveals that the Court below was correct.

Section 939.645, like its California kindred,[1] comes into play only after all elements of a substantive criminal offense are proved beyond a reasonable doubt. These elements include not only a defined physical act by the defendant — the *actus reus* — but also a defined criminal intent — the *mens rea*. Thus, Section 939.645 by definition punishes only those persons who both intended to commit the crime ***and*** who formed the intent to commit the crime because of their viewpoint concerning the victim's race, religion, color, disability, sexual orientation, or ancestry.

[1] *See, e. g.*, California Penal Code section 422.7, which provides:

> Except in the case of a person punished under Section 422.6, any crime which is not made punishable by imprisonment in the state prison shall be punishable by imprisonment in the state prison or in a county jail not to exceed one year, by a fine not to exceed ten thousand dollars ($10,000), or by both that imprisonment and fine, if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, under any of the following circumstances, which shall be charged in the accusatory pleading:
>
> (a) The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury.
>
> (b) The crime against property causes damage in excess of five hundred dollars ($500).

In making the perpetrator's ***viewpoint*** an essential element of the offense, Section 939.645 punishes protected expression. The argument to the contrary is, at bottom, an exercise in legal sophistry. In the words of Justice Black, "[n]o rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion." *Beauharnais* v. *Illinois*, 343 U.S. 250, 274 (1952) (Black, J., dissenting). The dominant purpose of Section 939.645 is to "chill" expressions that are founded upon the speaker's "hate" or other biases about personal attributes such as race, religion, color, disability, sexual orientation, or ancestry. Even though the overwhelming majority of Americans find expressions of group "hate" to be ugly and morally reprehensible, such expressions remain within the ambit of the First Amendment. As this Court observed last Term in *R.A.V.*, 112 S.Ct. at 2542 (citations omitted), "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."

B. Petitioner May Not Avoid the Invalidation of Section 939.645 Based on the Claim that the Defendant's Criminal Assault Is Not Protected by the First Amendment.

On behalf of Petitioner, *amici curiae* have argued that respondent Mitchell may not raise the issue of whether or not Section 939.645 violates the First Amendment on its face, because

> (c) The person charged with a crime under this section has been convicted previously of a violation of subdivision (a) or (b) of section 422.6, or has been convicted previously of a conspiracy to commit a crime described in subdivision (a) or (b) of Section 422.6.

California Penal Code section 422.75 provides:

> (a) Except in the case of a person punished under Section 422.7, a person who commits a felony or attempts to commit a felony because of the victim's race, color, religion, national country of origin, ancestry, or sexual orientation shall receive an additional term of one, two, or three years in state prison at the court's discretion.

Mitchell's violent actions, even if they included an expressive component, were not "protected" by the First Amendment. This argument has two basic fallacies. First, the postulated concept of "unprotected speech" is an oversimplified approach to the First Amendment problem, is not supported by this Court's decisions, and was expressly rejected last Term by this Court in *R.A.V.* Second, the Court has long recognized that the very existence of a criminal statute such as Section 939.645 chills expression by persons who are not before the Court, and may therefore be challenged successfully by a defendant prosecuted under that statute even though a more narrowly drawn statute would be permissible under the First Amendment as applied to the defendant's own conduct.

1. Criminal Acts, Though Punishable as Crimes, Retain First Amendment Protection for Their Components of Thought and Expression

The Court's discussion of the St. Paul, Minnesota ordinance involved in *R.A.V.* proceeded from the basic assumption that the ordinance punished only "fighting words" — a form of speech that is punishable, consistent with the First Amendment, because of its nonspeech elements. *R.A.V.*, 112 S.Ct. at 2543. The Court therefore addressed, at the beginning of its opinion, the concept of "unprotected speech" which *amici curiae* postulate to avoid First Amendment scrutiny here.

> We have sometimes said that [certain listed] categories of expression are 'not within the area of constitutionally protected speech,' or that the 'protection of the First Amendment does not extend' to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as 'not being speech at all.' What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.

112 S.Ct. at 2543 (citations omitted).

The present case involves no contention that defendant Todd Mitchell is "protected" against all criminal sanction based on his adjudicated viewpoint toward white persons. On the undisputed facts, he was properly convicted and punished with all due severity for the crime of felony aggravated battery, based on his participation in a nasty assault on Gregory Reddick. The issue to be considered by the Court is whether or not it is constitutionally permissible for the state to subject defendant Mitchell to a harshened criminal conviction and penalty, in comparison with any other similarly situated defendant, solely because of the jury's finding that defendant Mitchell "intentionally selected" Reddick as a crime victim because of Reddick's race, which is white.

As Petitioner tacitly concedes by omitting any such argument from its own brief, defendant Mitchell, even though he committed an act which is plainly punishable as a crime, has not forfeited any and all claim to First Amendment protection. As stated in *R.A.V.*, "[s]uch a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with [the Court's] jurisprudence as well." *R.A.V.*, 112 S.Ct. at 2543.

2. Section 939.645 Must Be Held Invalid as Overbroad Due to Its Chilling Effect on Expression, Even If It May Be Applied Lawfully as to Mitchell

In any prosecution under Section 939.645, the defendant's speech and expressive conduct constitutes the principal, if not the only, form of competent evidence. This must necessarily be the case, because there is simply no other way of divining the defendant's reason for "selecting" a particular crime victim. The "transcendent value to all society of constitutionally protected expression," *see Gooding* v. *Wilson*, 405 U.S. 515, 521-22 (1972), requires this Court to invalidate Section 939.645, even if a more narrowly drawn enhancement statute might constitutionally be applied to respondent Mitchell. Overbreadth scrutiny is required because of Section 939.645's actual and intended "chilling effect" on speech and expressive conduct by persons other than respondent.

In *Gooding* — a case in which this Court reviewed and invalidated as facially overbroad a Georgia statute which gave rise to a "hate speech" type prosecution — the Court explained its approach to legislation which "chills" protected expression as follows:

> The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.' Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may be regulated, suppressed, or punished is finely drawn, '[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.

> 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'

405 U.S. at 522 (citations omitted).

In the present situation, overbreadth analysis is particularly critical because of the strong likelihood that prosecutors, in seeking proof necessary for conviction under a statute such as Section 939.645, will draw upon evidence of statements made by a defendant long before the defendant formed an intent to commit a criminal act.[2] Petitioner's argument that "[a]buses are avoided when litigants are mindful of the proper relevancy limits on the admissibility of evidence, are mindful of the importance of protecting First Amendment activities, and when appellate courts provide the type of guidance this Court provided in *Dawson* [v. *Delaware*, *see infra*]," Petitioner's Brief at 12, is irreconcilable with the approach that this Court has consistently followed in respect to overbroad criminal statutes. *See*, *e. g.*, *Gooding*, *supra*; *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969) (in "hate speech" prosecution, invalidating as overbroad criminal syndicalism statute which "sweeps within its condemnation speech which our Constitution has immunized from governmental control").

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[2] As one example of a California prosecution which proceeded in this manner, the Court's attention is directed to the pending case of *In re Joshua H.*, Case No. H 008944 (Cal. 6th Dist. Court of Appeal). In that case, the Court in convicting the juvenile of a "sexual orientation" motivated assault under California's Penal Code § 422.7 (*see* note 1, *supra*) admitted, and found "determinative," statements made spontaneously by the minor to police officers after the minor's arrest on an unrelated matter some three years prior to the assault on trial. The minor allegedly told police officers that "he wanted to belong to an organization that was doing something about the niggers and faggots taking over the world." *In re Joshua H.*, *supra*, Reporter's Transcript on Appeal, at 400 (testimony), 612 (statement by trial court that evidence was "determinative.")

C. The Comparison to Cases in Which Personal Characteristics of the Defendant, Such as the Defendant's Religion, Association with Prison Gangs or Involvement in Declared Racial Wars, Have Been Held Permissible Factors to Consider in Sentencing, Is Inapposite Due to the Discretionary Nature of Sentencing

Petitioner relies heavily upon *Dawson* v. *Delaware*, ___ U.S. ___, 112 S.Ct. 1093 (1992), and *Barclay* v. *Florida*, 463 U.S. 938 (1982), in support of an argument that the Court has already considered and approved the use of personal characteristics of a defendant, including the defendant's racist beliefs, in sentencing. Petitioner's Brief, at 15-17. These cases do not apply here, because they dealt with the scope of information that may be considered by a judge or other sentencing authority in the highly discretionary process of sentencing. Neither of these decisions addressed the use of the defendant's expression and thought as an element of a statutory criminal offense enhancer such as Section 939.645.

In *Dawson*, the issue before the Court was whether or not it was error to permit the jury to consider, solely for purposes of determining whether death or life imprisonment was the more appropriate sentence, a stipulation concerning the defendant's association with a prison gang called the Aryan Brotherhood. The Court stated, in *dictum*, that the consideration of such a fact in the sentencing process does not violate the First Amendment right of the defendant to freedom of association, even though the First Amendment protects an individual's rights to join groups. 112 S.Ct. at 1097. However, the Court held that the consideration of such a stipulation violated the First Amendment, where there was no showing that the defendant's particular association or abstract beliefs were relevant to the determination of whether or not the defendant represented a danger to society. *Id.*, at 1097-98.

The primary significance of *Dawson*, as acknowledged by the dissent of Justice Thomas, *see id.*, at 1103-04, lay in the recognition by this Court that First Amendment ***does*** afford protection to a convicted offender in the sentencing process, notwithstanding the heinous nature of the crime of which the defendant has been convicted. In light of the Court's prior decisions, such as *Williams* v. *New York*, 337 U.S. 241 (1949), *United States* v. *Grayson*, 438 U.S. 41 (1978), and *Barclay* v. *Florida*, 463 U.S. 939 (1983), which underscored the permissibility of a highly subjective, standardless approach to the selection of a discretionary sentence, the Court's imposition of ***any*** form of First Amendment limitation on sentencing phase evidence represented a major development in First Amendment jurisprudence.

In *Barclay*, the Court addressed only in passing the question of whether or not it was an error for the sentencing judge, when choosing between life imprisonment or death as the penalty to impose in a capital case, to consider as one of many factors the racial motivation for the defendant's act of murder. The Court held that for purposes of the discretionary sentencing process, the consideration of the defendant's intent to start a race war was "relevant to several statutory aggravating factors," and was, in particular, permissible to consider in determining whether the statutory aggravating factor of an "especially heinous, atrocious, or cruel" circumstance was present. 463 U.S. at 948-51.

The crucial difference between the issue presented in *Dawson* and *Barclay* and the issue presented in this case is that the Court is here concerned with review of a jury's determination that the defendant "falls within the legislatively defined category of persons" on whom a sentence enhancement may be imposed. *Compare Barclay*, 463 U.S. at 950, *quoting California* v. *Ramos*, 463 U.S. 992, 1008 (1983) (articulating this distinction).

The incidental consideration of a defendant's thought, expression, or speech as indications of the defendant's character during the discretionary sentencing process is fundamentally differ-

ent from the use of thought, expression, or speech to define a substantive criminal offense or a substantive enhancement. *See generally*, *Dawson*, *supra*, 112 S.Ct. at 1103-04 (Thomas, J., dissenting).

The task of assessing the defendant's character in order to select an appropriate sentence within a statutorily prescribed range, as discussed at length in *United States* v. *Grayson*, 438 U.S. 41, 51-53 (1978), is a "parlous" task which requires the sentencing authority to base its decision upon "predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation." This function requires a court to consider as much information as possible about the defendant, including many kinds of facts that would be wholly inadmissible in a criminal trial. As restated in *Dawson*, this Court's cases "emphasize that 'the sentencing authority has always been free to consider a wide range of relevant material.'" 112 S.Ct. at 1097.

Thus, in *Williams* v. *New York*, 337 U.S. 241, 250-51 & n.15 (1949), this Court held that sentencing judges could — and indeed should — properly seek information concerning every aspect of the defendant's life, including matters such as the defendant's "religion," in seeking to "guide their judgment toward a more enlightened and just sentence." Yet it would be absurd to argue, based on *Williams*, that a state does not violate the First Amendment if it enacts a statutory sentence enhancement that increases the punishment for all violent crime perpetrators who are atheists.

Similarly, it is an entirely different matter, which was in no way addressed in either *Dawson* or *Barclay*, for a state to establish a sentence enhancement that is founded on the content of the defendant's thought and expression. Eligibility for a statutory offense enhancement is not a matter of sentencing discretion. Such an enhancement must be evaluated, under the First Amendment, like any other legislative classification, in the manner most recently articulated in *R.A.V.*: Absent a showing that necessity to promote a compelling state interest, the defendant's thought and expression

may ***not*** serve as the basis for using "hate" motivation to convict a defendant of a distinct offense which is subject to an additional range of statutory punishment.

D. Section 939.645 Is Invalid Because It Is Not Necessary in Order to Promote a Compelling State Interest.

Like the St. Paul ordinance held to be invalid in *R.A.V.*, and for the identical reasons, Section 939.645 fails to survive this rigorous ends-means test.

1. Although the State Has a Compelling Interest in Punishing "Hate Crimes," Statutes Such as Section 939.645 Are Not Necessary to Advance That Interest.

Petitioner and *amici curiae* have devoted extensive arguments and appendices to proving the compelling nature of the State's interest in protecting the basic human rights of members of historically oppressed groups. The compelling nature of this interest was expressly acknowledged in *R.A.V.*, 112 S.Ct. at 2549, and is readily conceded here. However, the question that was held "dispositive" in *R.A.V.* was whether the highly suspect ***means*** of a classification based on the idea content of expression is "reasonably necessary" to achieve that compelling interest. *Id. R.A.V.* held that in view of the availability of other criminal statutes, such a classification is invalid under the First Amendment.

The reasoning which led the Court to hold invalid the ordinance involved in *R.A.V.*, despite the compelling nature of the State's interest, applies equally here. Simply put, the content-based classification must be shown to be necessary to advance the State's interest. Where the conduct to be punished is, by definition, already a criminal offense, this strict nexus requirement is difficult to satisfy. "The existence of adequate content-neutral alternatives . . . 'undercuts significantly' any defense of such a statute." *R.A.V.*,

112 S.Ct. at 2550. Neither Petitioner nor *amici curiae* have shown why Wisconsin's criminal statutes and penalties — either as now existing or as potentially amended by the state legislature — are so inherently weak or inadequate that they render the adoption of an additional, thought content-based enhancement statute "reasonably necessary."

2. The Comparison of Section 939.645 to Remedial Employment Discrimination Statutes Is Inappropriate, Because Employment Discrimination Statutes, Unlike a Criminal Offense Enhancer, Are Reasonably Necessary to Promote a Compelling State Interest.

Petitioner argues that the invalidation of Section 939.645 will open a Pandora's Box requiring the invalidation of other, longstanding statutes, such as statutes authorizing civil liability and sanctions for racial or religious discrimination in employment. Petitioner points to such remedial civil rights legislation, including Title VII of the Civil Rights Act, 42 U.S.C. sections 2000e-2(a)(1) (employment discrimination), 42 U.S.C. section 3604 (housing discrimination), and Wis. Stats. sections 111.321-.322 (employment discrimination), as examples of existing statutes which impose civil penalties based on an intent to interfere with civil rights. This attempted analogy is unpersuasive.

First, the Court must remain mindful that legislation prescribing civil liability for employment and housing discrimination based on factors such as race, sex, and religion is grounded upon governmental commerce power. *E. g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 301-04 (1964). Such legislation, in contradistinction to criminal offense "enhancers," is properly found to be ***necessary***, because there are no other available, content-neutral methods of advancing the state's compelling interest in eliminating discrimination in housing and employment.

In other words, although such anti-discrimination legislation arguably places an incidental burden on thought and expression, the strict ends-means nexus test that applies to a regulation of thought and expression is satisfied in the case of employment and housing discrimination statutes.

Second, a civil penalty or prohibition of discrimination in employment does not necessarily entail ***any*** regulation of protected speech or thought. Thus, for instance, it is established that an employer's civil liability for discrimination may be proved by a "disparate impact" type theory, based on the demonstrated ***effects*** of an employment practice that is ***not*** itself intentionally discriminatory, without any necessity of proof that the employer actually intended to discriminate. *E. g.*, *Watson* v. *Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988). Where the actual focus of the legislative classification is an ***effect***, rather than a prohibition of subjective ***belief***, the classification is easier to reconcile with the First Amendment.

Third, a meaningful distinction may be drawn between the degree of "necessity" of statutes which are enacted to protect the affirmative exercise of constitutionally or statutorily protected rights by members of oppressed groups — *e. g.*, the "right to employment," the "right to use places of public accommodation," the "right to vote," the "right to associate," and the "right to travel" — and the degree of "necessity" of a statute such as Section 939.645 which merely adds additional "punishment" to the violation of a generalized right such as the "right to be free of unlawful assault."

Although this distinction was not articulated in cases such as *Screws* v. *United States*, 325 U.S. 91 (1945) and *United States* v. *Guest*, 383 U.S. 745 (1966), which demanded a "specific intent" requirement of federal criminal statutes punishing violations of civil rights in order to avoid the invalidation of these statutes on vagueness grounds, it does approach the core concern underlying these cases. Thus, the Court in *Screws* stated: "[t]he fact that a prisoner is assaulted, injured, or even murdered by state officials does not

necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." (325 U.S., at 108-09). It is almost too obvious to require mention that at the time *Screws* was decided, as now, the Fourteenth Amendment to the United States Constitution expressly guaranteed the right to life. Yet the *Screws* Court, in the above quoted passage, ***declined*** to hold that the specific intent requirement was satisfied by proof that the defendant "intended" to "violate" the victim's "right to life" because of his victim's race.

Although the wording of Wisconsin's Section 939.645 differs from the wording of the federal statute involved in *Screws*, the potential sweep of the two statutes is very similar. This point of similarity is well illustrated by the text of the California variation on the "hate crime" offense enhancer, quoted in note 1 *supra*. The same vagueness concerns addressed by the Court in *Screws* — which include concerns under the rubric of the Due Process Clause as well as the First Amendment — must be considered by the Court in deciding the present case.

II. PARTICULARLY IN LIGHT OF ITS BURDEN ON EXPRESSION, A STATUTE SUCH AS SECTION 939.645 VIOLATES THE DUE PROCESS CLAUSE AS WELL AS THE FIRST AMENDMENT, IN THAT IT IS UNDULY VAGUE AND IS INHERENTLY SUBJECT TO ARBITRARY, STANDARDLESS ENFORCEMENT

A. The Vagueness and Lack of Meaningful Standards for Enforcement Render "Hate Crime" Enhancement Statutes Uniquely Suited for Selective and Discriminatory Enforcement.

In this case a statute which is justified at length by Petitioner and *amici curiae* on the ground that it is necessary in order to protect members of minority groups from persecution on account of their group status has been used to ***punish*** a member of the

African-American minority racial group. This profound irony cannot escape the Court's notice. It is the position of *amicus curiae* California Attorneys for Criminal Justice that Section 939.645 and its kindred in other states are especially unsuited for their purported function, due to the probability of selective enforcement and prosecutorial biases, whether conscious or unconscious, which transform members of minority groups from the status of beneficiaries of the legislation to the status of its victims.

The more thoughtful commentators who have addressed the recent wave of "anti-hate crime" legislation have noted the likelihood that, in terms of achieving their purported objective, such legislation will do more harm than good. In Note, *Bias Crimes: Unconscious Racism in the Prosecution of 'Racially Motivated Bias'*, 99 Yale L.J. 845, 851-55 (1990), the author concludes that empirical evidence supports the hypothesis that the traditionally unreviewable discretion of prosecutors in determining what defendants are to be charged under a "hate crime" enhancer results in systematic, though unintentional, discrimination against African Americans and other members of minority racial groups. The Note proposes a model state statute that would limit or eliminate prosecutorial discretion.

In his 1990 article, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, Professor Kenneth L. Karst points out a more elemental flaw in the "legislative" approach to eliminating group bias. By their very nature, criminal statutes which purport to enforce a normative tone of civil, "civic" discourse on racial, sexual, or other group issues — a form of dialogue which Karst terms the speech of "Reason" — are inherently unsuited to aiding disempowered groups.

> To focus the constitutional freedom of expression on the speech of Reason, in the mode of civic deliberation, makes the freedom almost useless when cultures collide. Usually, it is outsiders who have to invoke the first amendment; the insiders who do the suppressing are sure to say that Reason has nothing to do

> with the case. In American history, the hand of the censor has always fallen disproportionately on speakers and writers who are members of racial or ethnic or religious minorities. What good is a constitutional protection centered on deliberative Reason for the outsiders whose messages are labeled Unreason and whose methods are not deliberative? The civic debate model's impoverished understanding not only clouds our view of the functions of freedom of expression but also threatens the liberating expression of subordinated groups.

K. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups,* 1990 U.Ill.L.Rev. 95, 126-27.

In connection with the pending case of *People* v. *Mearra S.*, Case No. A 055072 (Cal. First District Court of Appeal), which is an appeal of the conviction of an African American juvenile offender under California's "hate crime" offense enhancer statutes, *amicus curiae* conducted and submitted to the court an informal survey of approximately 21 public defender offices. This survey revealed that there was relatively little use of the hate crime enhancer laws in California. However, anecdotal information received from the public defender and defense counsel revealed that on the occasions in which the "hate crime" enhancer was charged, the fact pattern presented in this case, where a defendant of color is the person to whom the "hate crime" enhancer is applied, is the typical case rather than the exception.[3]

The ultimate decision concerning the wisdom of the approach to "hate crime" which is embodied in Section 939.645 and its kindred is, of course, for the Legislatures of the states rather than

[3] In San Francisco County, for example, the majority of cases prosecuted under California's hate crime statutes involved white victims. In some cases, they involved police officers. A sizeable number of those arrested and charged with the hate crimes were themselves from minority groups. In Sonoma County, of the cases reported, half of those prosecuted were Hispanic, the other half, white. In San Diego, forty percent of those prosecuted were black, sixty percent were white.

this Court. This obvious fact notwithstanding, *amici curiae* supporting petitioner have presented this Court with voluminous exhibits purporting to justify the "necessity" of "social legislation" such as Section 939.645. In evaluating these exhibits, the Court would do well to observe that, as a ***means*** of achieving the laudable ends of social reform that are urged by *amici curiae*, legislation such as Section 939.645 is so standardless, so arbitrary in its enforcement, and so vague in its compass of evidence of guilt, as to engender a substantial question as to its validity under the Due Process Clause. *See generally*, *Screws* v. *United States*, *supra*, 325 U.S. at 94-98 (plurality opinion of Douglas, J.).

B. Due to Its Vagueness, Arbitrariness, and Lack of Ascertainable Standards for Enforcement, Section 939.645 and Its Kindred Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Where criminal statutes trench upon the realm of thought and speech, this Court has been particularly careful to ensure that the legislation is neither vague nor overbroad. *E. g.*, *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961). In view of the burden which the statute places on expression, the lack of identifiable standards of guilt and resulting arbitrariness which are inherent in a statute such as Section 939.645 render such legislation invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Attorney Stewart Pollack, defending an alleged "hate crime" in Alameda County, described the nature of the case that he was defending in some detail. A store owner, Asian, and a black male were involved in a dispute, characterized in reports as "a matter of principle." The reports indicated that the accused stated that he "hated" the operators of the market, and would harass them until they left the neighborhood. Mr. Pollack indicated that the ongoing dialogue centered on the perceived treatment that black customers received in the store.

Deputy Public Defender Randy Danto, of the Santa Clara County Public Defender's Office, described a case involving two black defendants accused of two counts of attempted murder, with enhancements brought pursuant to California's hate crimes statutes. The victims were white and Hispanic.

Under close examination, almost every aggravated battery is revealed to be an ugly, morally repugnant act of "hate." How then should a prosecutor, acting under a statute such as Section 939.645, differentiate those hateful acts which are grounded in a proscribed form of "group bias" from acts which are grounded in "ordinary" forms of hate? Section 939.645 and its kindred provide no guidance. To cast the prosecutor's dilemma in the more concrete terms of the present case: How can she be certain that defendant Mitchell's "selection" of victim Reddick was truly based on Mitchell's perception of Reddick's race, as opposed to Mitchell's perception of Reddick as a wealthy person? The record before the prosecutor in this case, and no doubt in many others, could be squared with either hypothesis. Yet a hatred of Reddick for being "rich" is presumably a complete defense to the Section 939.645 charge. Thus, in the crucial sense that guilt or innocence is difficult if not impossible to know or ascertain in advance of prosecution, Section 939.645 is extremely vague.

By the same token, a prosecution under Section 939.645 places the defendant in the absurd position of having to "defend" his case by explaining to the jury that he "hated" his victim for a reason not proscribed by the statute. Thus Mitchell presumably could have won acquittal of the hate crime enhancer charge by introducing reasonable doubt as to whether he "hated" Reddick because he was white, or because he is rich enough to afford expensive sneakers. The legislative classification which gives rise to such a bizarre "defense" is a patently irrational criminal penalty scheme.

Particularly because the irrational distinction is grounded in the content of the defendant's thought and expression, Section 939.645 violates the Equal Protection Clause of the Fourteenth Amendment. *See Boos* v. *Barry*, 485 U.S. 312, 320-21 (1988).

CONCLUSION

In the so-called "Skokie" American Nazi case, District Judge Decker summed up the First Amendment's command with respect to "hate speech" in the following terms:

> When feelings and tensions are at their highest peak, it is a temptation to reach for one exception to the rule announced by Mr. Justice Holmes, 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.'
>
> Freedom of thought carries with it the freedom to speak freely and to publicly assemble to express one's thoughts.
>
> The long list of cases reviewed in this opinion agrees that when a choice must be made, it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear.

Collin v. *Smith*, 447 F.Supp. 676, 702 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, *sub nom. Smith* v. *Collin*, 436 U.S. 953; *cert. denied sub nom. Smith* v. *Collin*, 439 U.S. 916 (1979).

Wisconsin Criminal Code Section 939.645 is truly an unnecessary, arbitrary enactment which is likely to do little to quell group tensions, but which, if not struck by this Court, is likely to do grave damage to the First Amendment.

Today, the issue before the Court is an enhanced punishment of crimes committed due to "group hate." If this statute is held to be permissible, the legislatures of the several states and the Congress of the United States may tomorrow enact enhanced punishments for crimes committed due to "opposition to abortion," or due to "opposition to United States foreign policy." The Court would open Pandora's box by preserving, not by striking down, Section 939.645.

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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